IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1050

[illegible] LANGHAM et al.

v.

[illegible]

On Appeal From the Court of Appeals for the State of Maryland

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL OR AFFIRM

[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 589

LOREN L. LANDMAN, et al., *Appellants*,

v.

ROBERT MIEDZINSKI, Sheriff of St. Mary's County, et al., *Appellees*.

On Appeal From the Court of Appeals for the State of Maryland

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BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL OR AFFIRM

I.

AS TO APPELLEES' CONTENTION THAT CHAPTER 18 OF THE ACTS OF MARYLAND OF 1958 OPERATES ALIKE UPON ALL PERSONS AND PROPERTY UNDER THE SAME CIRCUMSTANCES AND CONDITIONS, AND IS REASONABLY RELATED TO THE OBJECT SOUGHT TO BE ACHIEVED BY THE LEGISLATURE OF MARYLAND IN ENACTING THIS LEGISLATION

The appellees suggest that Chapter 18 of the Acts of Maryland of 1958 (hereinafter referred to as "the 1958 statute") is based upon a fair and substantial relation to some legitimate legislative objective. Further, the appellees contend that the legislative aims

which are to be fostered by Chapter 18 are twofold, namely:

> (1) to forbid establishments which, by virtue of their location, are more difficult to police; and
>
> (2) to forbid establishments which, though within the undisputed territorial limits of the State of Maryland, infringe upon the policies of the neighboring Commonwealth of Virginia.

But, the appellants have demonstrated that the record in this case is completely void of any legislative declaration or history, or any other extrinsic evidence, which would indicate that the reasons suggested by the appellees are, in fact, the actual reasons behind the Legislature's creation of the classification within which the appellants now find themselves. Nor does it appear from anything in the record that establishments comprised in that classification are, in fact, more difficult to police than others, or do, in fact, infringe upon any policy of the State of Virginia.

The appellants have shown that the lower courts' attribution of the two suggested objectives to the statute was merely the result of judicial conjecture—in clear contradiction to this Court's admonition that it is not the function of the judiciary "to conjure up possible situations which might justify the discrimination". *Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U.S. 266, 274; see also, *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194.

While the appellants concede that a State may, upon any reasonable basis, discriminate between persons in the exercise of its inherent police power, the appellants submit that in the absence of a clear showing of legis-

lative intent it is not the function of the judiciary to indulge in conjecture as to possible reasons for the passage of legislation. When faced with a statute unsupported by legislative history or extrinsic evidence indicating the thinking which went into its enactment, the Court has no other alternative than to judge the act by its words.

Utilizing this approach, analysis of the 1958 statute demonstrates, at the very least, that the two alleged objectives cannot be inferred from the statute itself, because the statute (1) permits the operation of establishments which are more difficult to police than those it prohibits, and (2) prohibits the operation of establishments which could not possibly affect the interests of the State of Virginia.

In response to appellants' showing, however, that the 1958 statute does not clearly support the two aims which have been ascribed to it, the appellees answer, in their *Motion to Dismiss or Affirm*, by citing a number of decisions of this Court in support of the proposition that there is a presumption in favor of the validity of a legislative enactment, *Salsburg* v. *Maryland*, 346 U.S. 545; *Screws* v. *United States*, 325 U.S. 91; and that the burden of establishing the unconstitutionality of a statute rests on him who assails it. *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U.S. 580.

It is equally well settled, however, that the presumption of unconstitutionality must fall when it is demonstrated that the statute in question offends the guaranty of equal protection of the laws. *Smith* v. *Cahoon*, 283 U.S. 553; *Skinner* v. *Oklahoma*, 316 U.S. 535. In order for a classification to be valid under

the equal protection clause of the Fourteenth Amendment it must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Magoun* v. *Illinois Trust and Savings Bank,* 170 U.S. 283; *Colgate* v. *Harvey,* 296 U.S. 404, 422, 423; *Morey* v. *Doud,* 354 U.S. 457.

The presumption of constitutional validity does not, *ipso facto,* answer the appellants' showing that the 1958 statute is repugnant to the equal protection clause of the Fourteenth Amendment in that the classification which it creates is purely arbitrary since it prohibits the continued operation of otherwise lawful establishments, while allowing the operation of similar establishments—built over the same waters—in the same counties of Maryland. *Smith* v. *Cahoon, supra; Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison,* 301 U.S. 459, 462; *Skinner* v. *Oklahoma, supra.*

II.

AS TO APPELLEES' CONTENTION THAT CHAPTER 18 DOES NOT VIOLATE APPELLANTS' RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Appellees assert that the 1958 statute does not destroy the business property or the business of the appellants. The State alleges further that the statute does not deprive the appellants of their liberty to engage in a lawful business, "but rather, it simply prohibits the use of gambling devices which were only incidental to their business". (*Motion to Dismiss,* etc., p. 11).

In support of these allegations the appellees refer to the decision of this Court in the case of *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489, and the discussion therein by Mr. Justice Douglas of the power of a State to enact legislation which limits the activities of a particular class of persons. The Court, in that case, held, *inter alia*, that:

> [t]he equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. (At page 489).

While it is clear that the State has retained the power incidental to its policing requirements, as indicated by Mr. Justice Douglas, it is equally well settled that this power is not plenary and must be fitted within the framework of the constitutional guarantees of due process and equal protection of the law.

In the present case, the appellants have amply demonstrated in their *Jurisdictional Statement*, as well as in their original equitable bill filed in the court of first instance, that the operation of the 1958 statute deprives them, without compensation, of their business property in an immediate practical sense. The 1958 statute is not simply a prohibition against the use of gaming devices, as suggested by the appellees, but in practice has resulted in the total closing down of appellants' establishments. See the affidavits filed in support of appellants' motion for stay herein. In reality, rather than the gaming devices being merely incidental to the appellants' restaurant business, the latter were

merely incidental to the operation and maintenance of the gaming devices. The end result, therefore, of the enactment of the 1958 statute has been a literal taking of appellants' property without any compensation in any form. This is clearly not sanctioned by the law. *Seattle Title Trust Co.* v. *Roberge,* 278 U.S. 116; *Truax* v. *Corrigan,* 257 U.S. 312.

It is obvious that there is no foundation for appellees' contention that Chapter 18 deprives the appellants only of their liberty to engage in a particular kind of business activity, but not of their property. As pointed out by this Court in *Smith* v. *Texas,* 233 U.S. 630, 636, life, liberty, property and the equal protection of the law are so intimately entwined that the deprivation of the enjoyment of any one of these rights necessarily "lessens or extinguishe[s] the value of the other three". Chapter 18 not only deprives the appellants of their right to engage in their legitimate business, in violation of the constitutional guaranty of equal protection of the law, but also takes their property from them without compensation, in derogation of the due process mandate of the Fourteenth Amendment to the United States Constitution. *Truax* v. *Corrigan, supra; Reagan* v. *Farmers Loan and Trust Co.,* 154 U.S. 362; *Yick Wo* v. *Hopkins,* 118 U.S. 356.

CONCLUSION

For the foregoing reasons, taken together with those set out in appellants' *Jurisdictional Statement,* we submit that this Court should:

(1) deny appellees' motion to affirm the judgment below;

(2) deny appellees' motion to dismiss the appeal; and

(3) allow full argument on the questions which have been presented.

Respectfully submitted,

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